I...ON FILED
JAN 2 2001

(3)

No. 00-906

In the

Supreme Court of the United States

COUNTY OF ERIE, PENNSYLVANIA,

Petitioner,

v.

ERIE COUNTY RETIREES ASSOCIATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WILLIAM J. NELLIS
Counsel of Record
Secretary to the Board
Central States, Southeast and Southwest Areas Health and Welfare Fund
9377 West Higgins Road
Rosemont, Illinois 60018
(847) 518-9800

THOMAS C. NYHAN
General Counsel
Central States, Southeast and Southwest Areas Health and Welfare Fund
9377 West Higgins Road
Rosemont, Illinois 60018
(847) 518-9800

Attorneys for Amicus Curiae

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

20 pp

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

Central States, Southeast and Southwest Areas Health and Welfare Fund ("CS Fund"), pursuant to Rule 37 (b) of the Rules of this Court, respectfully moves for leave to file an *amicus curiae* brief.

1. Petitioner County of Erie, Pennsylvania has provided written consent to the filing by CS Fund of an *amicus curiae* brief. Respondents have declined to provide written consent to the filing by CS Fund of an *amicus curiae* brief.

2. CS Fund is a multiemployer plan and an employee welfare benefit plan (and trust) funded by thousands of contributing employers (each an "employer" as defined in 29 U.S.C. § 630[b]).

3. For 30+ years CS Fund's benefits plan has included a separate plan for coverage of its eligible retired participants and their eligible spouses ("CS Retiree Plan"), a plan now placed at serious risk by the decision in *Erie County Retirees Association* v. *County of Erie, Pennsylvania*, 220 F.3d 193 (3rd Cir. 2000), of a charge that it has long violated, and is violating, the proscription by the Age Discrimination in Employment Act of 1967 ("ADEA") of ". . . discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ." 29 U.S.C. § 623(a).

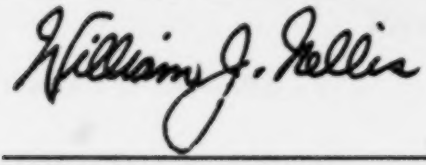
4. Around 25,000 eligible retirees and their eligible spouses are covered by the CS Retiree Plan and receive benefit payments from CS Fund in excess of $150 million

per year. From its inception on May 1, 1970, until the present, the CS Retiree Plan has at all times prescribed, and prescribes, Medicare entitlement as a coverage termination event, consistent with the fact that its coverage has always served, and serves, as a bridge to Medicare from early retirement. Until the *Erie County Retirees* decision on August 1, 2000, there was every reason for CS Fund and employee welfare benefit plans across the nation to conclude that their bridge-to-Medicare retiree benefit programs were entirely lawful. In *Erie County Retirees*, however, the Third Circuit has announced that unlawful age discrimination infects those programs.

5. In its proposed *amicus curiae* brief, CS Fund seeks to focus on the serious threat to bridge-to-Medicare retiree benefit programs of multiemployer plans (and other plans) which the *Erie County Retirees* decision by the Third Circuit creates, in the context of a reason additional to those stated in the pending petition. That reason is the separate and express authority enacted by Congress for the termination of specific benefits coverage, by CS Fund and other employee welfare benefit plans, at the time and on the basis of Medicare entitlement. That termination authority was created by the Consolidated Omnibus Budget Reconciliation Act of 1985, *see* 29 U.S.C. § 1162(2)(D) and 26 U.S.C. § 4980B(f)(2)(B)(iv), and Congress, when it later enacted the Older Workers Benefit Protection Act of 1990 (amending the ADEA in the wake of, and in response to, a 1989 decision by this Court), did not to any extent curtail that authority to terminate coverage upon Medicare entitlement.

December 29, 2000.

Respectfully submitted,



WILLIAM J. NELLIS
Counsel of Record
Secretary to the Board
Central States, Southeast
and Southwest Areas
Health and Welfare Fund
9377 West Higgins Road
Rosemont, Illinois 60018
(847) 518-9800

THOMAS C. NYHAN
General Counsel
Central States, Southeast
and Southwest Areas
Health and Welfare Fund
9377 West Higgins Road
Rosemont, Illinois 60018
(847) 518-9800

Attorneys for Amicus Curiae

BRIEF OF *AMICUS CURIAE*

TABLE OF CONTENTS

PAGE

THE INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT: REASONS FOR ALLOWANCE OF THE WRIT 3

CONCLUSION 12

TABLE OF AUTHORITIES

Cases	PAGE(S)
Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. *Norris*, 463 U.S. 1073 (1983)	5
Blue Cross and Blue Shield of Texas, Inc. v. *Shalala*, 995 F.2d 70 (5th Cir. 1993)	9
Central States, Southeast and Southwest Areas Pension Fund v. *Central Transport, Inc.*, 472 U.S. 559 (1985)	3-4
Erie County Retirees Association v. *County of Erie, Pennsylvania*, 220 F.3d 193 (3rd Cir. 2000)	1-2, 4, 10-12
Geissal v. *Moore Medical Corp.*, 524 U.S. 74 (1998)	9
Public Employees Retirement System of Ohio v. *Betts*, 492 U.S. 158 (1989)	10-11

Statutes and Regulations

Age Discrimination in Employment Act of 1967:

29 U.S.C. §§ 621-634 ..... 1, 3-4

29 U.S.C. § 623 ..... 1, 5, 12

Employee Retirement Income Security Act of 1974:

29 U.S.C. §§ 1161-1167 9

29 U.S.C. § 1162 ..... 2, 9

Internal Revenue Code:

26 U.S.C. § 4980B 2, 9

Older Workers Benefit Protection Act of 1990 ..... 2, 11-12

Social Security Act:

42 U.S.C. § 1395i-2(a)(1) 6

42 U.S.C. § 1395y(b)(1)(C) 9

42 CFR § 411.161(a)(3) 10

THE INTEREST OF THE *AMICUS CURIAE*[1]

Central States, Southeast and Southwest Areas Health and Welfare Fund ("CS Fund") is a multiemployer plan and an employee welfare benefit plan (and trust) funded by thousands of contributing employers (each an "employer" as defined in 29 U.S.C. § 630[b]). For 30+ years CS Fund's benefits plan has included a separate plan for coverage of its eligible retired participants and their eligible spouses ("CS Retiree Plan"), a plan now placed at serious risk by the decision in *Erie County Retirees Association* v. *County of Erie, Pennsylvania*, 220 F.3d 193 (3rd Cir. 2000), of a charge that it has long been in substantial and continuous noncompliance with the proscription by the Age Discrimination in Employment Act of 1967 ("ADEA") of ". . . discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ." 29 U.S.C. § 623(a). As hereinafter explained in further detail, around 25,000 eligible retirees and their eligible spouses are covered by the CS Retiree Plan and receive benefit payments from CS Fund in excess of $150 million per year. From its inception on May 1, 1970, until the present, the CS Retiree Plan has at all times prescribed, and prescribes, Medicare entitlement as a coverage termination event, consistent with the fact that its coverage has always served, and serves,

---

[1] This brief has been authored entirely by counsel of record for the CS Fund. No counsel for a party to this proceeding authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation and submission of this brief.

as a bridge to Medicare from early retirement. Until the *Erie County Retirees* decision on August 1, 2000, there was every reason for CS Fund and employee welfare benefit plans across the nation to conclude that their bridge-to-Medicare retiree benefit programs were entirely lawful. In *Erie County Retirees*, however, the Third Circuit has announced that unlawful age discrimination infects those programs. CS Fund and other plans need to ascertain and confirm the legality of their bridge-to-Medicare retiree benefit programs.

SUMMARY OF THE ARGUMENT

CS Fund seeks to focus on the serious threat to bridge-to-Medicare retiree benefit programs of multiemployer plans (and other plans) which the *Erie County Retirees* decision by the Third Circuit creates, in the context of a reason additional to those stated in the pending petition. That reason is the separate and express authority enacted by Congress for the termination of specific benefits coverage, by CS Fund and other employee welfare benefit plans, at the time and on the basis of Medicare entitlement. That termination authority was created by the Consolidated Omnibus Budget Reconciliation Act of 1985, *see* 29 U.S.C. § 1162(2)(D) and 26 U.S.C. § 4980B(f)(2)(B)(iv), and Congress, when it later enacted the Older Workers Benefit Protection Act of 1990 (amending the ADEA in the wake of, and in response to, a 1989 decision by this Court), did not to any extent curtail that authority to terminate coverage upon Medicare entitlement.

ARGUMENT: REASONS FOR ALLOWANCE OF THE WRIT

Petitioner County of Erie, Pennsylvania ("Petitioner") is both an "employer" for purposes of the ADEA, 29 U.S.C. §§ 621-634, and the plan sponsor of a single-employer plan. CS Fund (*amicus curiae*), which is familiar to the Court from past appearances as a party and as an *amicus curiae* (it is *an amicus* in *Reynolds Metal Co.* v. *Robert Ellis*, pending No. 99-1787, in which certiorari was granted on November 27, 2000), is neither the "employer" (save for its own employees, a minimal fraction of its participant base) nor a single-employer plan. CS Fund and its jointly administered sister plan are described by the Court in *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 561-562 (1985):

> "Petitioners are two large multiemployer benefit plans, the Central States, Southeast and Southwest Areas Pension Fund and the Central States, Southeast and Southwest Areas Health and Welfare Fund (hereinafter referred to collectively as Central States). [FN1] Governed by § 302(c)(5) of the Labor Management Relations Act, 1947, 29 U.S.C. § 186(c)(5), and the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, 29 U.S.C. § 1001 et seq., as amended by the Multiemployer Pension Plan Amendments Act of 1980, Pub.L. 96-364, 94 Stat. 1208, these plans operate as trusts for the purpose of providing specified health, welfare, and pension benefits to employees performing work that is covered by collective-bargaining agreements negotiated by various affiliates of the International Brother-

hood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters)."

* * * * *

"FN1. As the Court of Appeals noted: 'The record . . . indicates that the Funds are among the largest Taft-Hartley trust funds in the United States, that more than 13,000 employers participate and that they serve more than 500,000 employees whose job classifications are covered in thousands of collective bargaining agreements.' 698 F.2d 802, 811 (CA 6 1983). See also Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364, 373, n. 16, 104 S.Ct. 1844, 1850, n. 16, 80 L.Ed.2d 366 (1984)."

CS Fund offers a perspective and an impact statement on the issue presented that Petitioner cannot. Being a negotiated multiemployer plan and employee welfare benefit plan (and trust), CS Fund brings to the Court thousands of its contributing employers (each an "employer" as defined in 29 U.S.C. § 630[b]) and their employees, all of whom have consented to the total and continuing delegation to CS Fund and its trustees of exclusive authority and responsibility to establish, define, amend, maintain and administer its plan benefits.

For 30+ years CS Fund's benefits plan has included a separate plan for coverage of its eligible retired participants and their eligible spouses ("CS Retiree Plan"), a plan now placed at serious risk by the Third Circuit's recent decision in *Erie County Retirees*, 220 F.3d 193, *supra*, of a charge that it has long been in substantial and continuous noncompliance with

ADEA mandates.[2]

The creation and material terms of the CS Retiree Plan were announced by CS Fund in a letter to its participants dated October 16, 1970 (20 years after CS Fund was established), stating in relevant part as follows (emphasis in original):

> "As a result of the recently negotiated National Master Freight Agreement which provided for increases of a total of $4.00 per week over a 39 month period in Health and Welfare contributions to the Fund, the Trustees are happy to announce the establishment of new RETIREES' HEALTH AND WELFARE PROGRAMS.
>
> "This new benefit schedule will be effective as of May 1, 1970 and will cover employees who retired on or after January 1, 1970, who were eligible for their retirement benefits under a qualified pension fund, and who were covered under the Central States, Southeast and Southwest Areas Health & Welfare Fund."

---

[2] ADEA Section 4(a), 29 U.S.C. § 623(a), states in relevant part that "[i]t shall be unlawful for an employer—(1) to . . . otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ." Even though the administration and administrator (the board of trustees) of CS Fund are independent from its thousands of contributing employers, it is required by *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 463 U.S. 1073 (1983), that each such ". . . employer that adopts a fringe-benefit scheme that discriminates among its employees on the basis of . . . [age violates that ADEA mandate] regardless of whether third parties are also involved in the discrimination" (at 1089).

* * * * *

"To be eligible the member must have attained his 57th birthday. Program will cover retiree and his spouse from age 57 until age 65 when member becomes eligible for Medicare. Spouses' coverage terminates when members' coverage terminates.

"In the event that member dies prior to age 65, spouse will be covered for balance of five years measured from his retirement date, or until she becomes eligible for Medicare whichever is first.

"Where spouse is older than member, her coverage will terminate when she becomes 65 and member will continue until he is 65."

From its inception on May 1, 1970, until the present, the CS Retiree Plan has at all times prescribed, and prescribes, Medicare entitlement as a coverage termination event, consistent with the fact that its coverage has always served, and serves, as a bridge to Medicare from early retirement.[3] There was no toll charged by CS Fund for that bridge from its 1970 inception until October 1, 1988, and since that date the charge has been and is a $50.00 premium per retiree-spouse unit per month, an

---

[3] When the CS Retiree Plan was established in 1970, the age-based initial Medicare entitlement date was the date on which the eligible ". . . individual . . . attained the age of 65" (absent other entitlement such as *early Medicare*). 42 U.S.C. § 1395i-2(a)(1). The age-based initial Medicare entitlement date remains the same today.

amount far less than corresponding coverage costs.[4]

During the past 30+ years, many tens of thousands of retirees and their spouses have come to depend upon the CS Retiree Plan as a bridge from active-employee coverage by CS Fund to Medicare entitlement. A demographic snapshot of CS Fund's eligible retiree-population age groups at year-end of the last five calendar (plan) years discloses the following eligible retiree-spouse units:

---

[4] CS Fund records demonstrate the substantial extent to which its unsegregated trust assets subsidize benefit payments ("Retiree Benefits") for retirees and spouses covered by the CS Retiree Plan, such as this excerpt for the last five calendar (plan) years:

Year	Retiree Benefits	Premiums to CS Fund from Retirees and Spouses
1995	$111,660,000	$12,250,000
1996	121,785,000	13,389,000
1997	125,383,000	13,788,000
1998	133,327,000	14,060,000
1999	158,329,000	15,549,000
Total	$650,484,000	$69,036,000

Over this 1995-1999 period, the premium charges to eligible retirees and spouses ($69.036 million) have been less than 11% of the Retiree Benefits ($650.484 million) distributed to the same group. (A "retiree-spouse unit", to which each monthly premium is charged, is either a retiree alone [if there is no eligible spouse] or his/her eligible spouse [if the retiree is no longer eligible] or both retiree and spouse as a single unit.)

Retiree Age Group	12/31/95	12/31/96	12/31/97	12/31/98	12/31/99
48-50	35	66	57	64	81
51-54	943	905	746	905	1,112
55-59	5,203	5,316	5,114	5,919	6,664
60-62	6,558	6,620	6,304	6,612	6,878
63-64	5,652	5,507	5,405	5,571	5,636
65-67	2,938	4,034	4,412	4,401	4,456
Total	21,329	22,448	22,038	23,472	24,827

(The age used is the retiree's—group members over age 65 are eligible spouses of no-longer-eligible retirees, the spouses themselves being less than age 65.) As reflected in the above chart, CS Fund was distributing plan benefits to a group of 24,827 retiree-spouse units as of December 31, 1999. The CS Retiree Plan expressly provides, as it has for many years, that "Coverage under this Plan shall terminate on the earliest of the following dates", one of which dates is "on the date the Covered Participant [retiree or retiree's spouse] attains sixty-five (65) years of age . . ." (§§ 3.06 and 3.07).

That reliance by retirees, spouses and CS Fund itself has been placed not only on the express bridge-to-Medicare provisions of the CS Retiree Plan but on Congress itself. The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") amended ERISA and the Internal Revenue Code to provide, among other things, that employee welfare benefit plans including CS Fund must, in specified circumstances, offer continued coverage ("COBRA Continuation Coverage") to plan participants and their covered dependents for specific periods after

coverage would otherwise have terminated under plan terms. 29 U.S.C. §§ 1161-1167; 26 U.S.C. § 4980B. *See Geissal* v. *Moore Medical Corp.*, 524 U.S. 74 (1998). Congress expressly provided a list of COBRA Continuation Coverage termination events:

> **"(D) Group health plan coverage or medicare entitlement**
>
> "The date on which the qualified beneficiary first becomes, after the date of the election—
>
> "(i) covered under any other group health plan (as an employee or otherwise) . . ., or
>
> (ii) in the case of a qualified beneficiary other than a qualified beneficiary described in section 1167(3)(C) of this title, entitled to benefits under title XVIII of the Social Security Act [42 U.S.C.A. § 1395 et seq.]."

29 U.S.C. § 1162(2)(D); *accord* 26 U.S.C. § 4980B(f)(2)(B)(iv). Initial Medicare entitlement "after the date of the election" of COBRA Continuation Coverage is, by act of Congress, a permissible reason to terminate such coverage, and the CS Retiree Plan so provides (§ 3.08). In litigation about this same COBRA Continuation Coverage termination authority from Congress, as applied to termination of such coverage by Medicare entitlement, the Department of Health and Human Services ("HHS") claimed that Congress had subordinated that authority to another coverage mandate, 42 U.S.C. § 1395y(b)(1)(C), but the Fifth Circuit concluded otherwise in *Blue Cross and Blue Shield of Texas, Inc.* v. *Shalala*, 995 F.2d 70 (5th Cir. 1993). HHS subsequently changed its position and now acknowledges the supremacy of the above-cited

legislative authority for termination of COBRA Continuation Coverage, based upon Medicare entitlement, over the Medicare-related coverage mandate at issue in *Shalala*. *See* 42 CFR § 411.161(a)(3).

Employee welfare benefit plans including CS Fund are expressly authorized by Congress, in COBRA, to terminate COBRA Continuation Coverage upon Medicare entitlement: while that express authority relates to a specific federal coverage mandate, Congress has in ERISA scrupulously avoided placing coverage mandates upon employee welfare benefit plans in virtually all instances (COBRA being a rare exception). Such plans, including CS Fund, are granted discretion to create, amend and apply plan terms—including the extent to which prescribed coverage is subordinate to, and in some instances terminated by, other coverage including Medicare entitlement.

Until the *Erie County Retirees* decision on August 1, 2000, there was every reason for CS Fund and employee welfare benefit plans across the nation to conclude that their bridge-to-Medicare retiree benefit programs were entirely lawful. In *Erie County Retirees*, however, the Third Circuit has announced that unlawful age discrimination infects those programs. That infection is not traced to ADEA's 1967 enactment because, as the Third Circuit notes (220 F.3d at 203-204), this Court found otherwise in *Public Employees Retirement System of Ohio* v. *Betts*, 492 U.S. 158 (1989), stating in part that ". . . under this construction of the statute, Congress left the employee benefit battle for another day, and legislated [in the ADEA] only as to hiring and firing, wages and

salaries, and other non-fringe-benefit terms and conditions of employment" (at 177). Instead the Third Circuit bases the infection of unlawful age discrimination in the Older Workers Benefit Protection Act of 1990 ("OWBPA"), which was enacted in the wake of, and in response to, this Court's decision in *Betts*. The Third Circuit's opinion carefully traces OWBPA's legislative history (220 F.3d at 205-208) including this revealing pre-enactment record of legislative intent (136 Cong. Rec. S13,597 [daily ed. Sept. 24, 1990]; emphasis added):

> "Many employer-sponsored retiree medical plans provide medical coverage for retirees only until the retiree becomes eligible for Medicare. In many of these cases, where coverage is provided to retirees only until they attain Medicare eligibility, the value of the employer-provided retiree medical benefits exceeds the value of the retiree's Medicare benefits. Other employers provide medical coverage to retirees at a relatively high level until the retirees become eligible for Medicare and at a lower level thereafter. In many of these cases, the value of the medical benefits that the retiree receives before becoming eligible for Medicare exceeds the total value of the retirees' Medicare benefits and the medical benefits that the employer provides after the retiree attains Medicare eligibility. These practices are not prohibited by this substitute. Similarly, nothing in this substitute should be construed as authorizing a claim on behalf of a retiree on the basis that the actuarial value of employer-provided health benefits available to that retiree not yet eligible for Medicare is less than the actuarial value of the same benefits available to a younger retiree."

In the face of OWBPA's abundant legislative history that recorded a clear legislative intent to continue and preserve ADEA's now-undisputed 1967-1990 allowance of bridge-to-Medicare retiree benefit programs, the Third Circuit proceeded to an analysis that ultimately resulted in its conclusion that such programs do fall within ADEA Section 4(a)'s ambit (29 U.S.C. § 623[a]) of proscribed age discrimination in "compensation, terms, conditions, or privileges of employment. . . ." 220 F.3d at 208-213. The errors in that analysis and conclusion are explained in Petitioner's pending application for a writ of certiorari—CS Fund adopts that explanation and, in order to preserve the true legislative intent of Congress on the important issue presented, requests that this Court reverse the Third Circuit's decision in *Erie County Retirees*.

CONCLUSION

If permitted to stand, the decision by the Third Circuit in *Erie County Retirees*, which is a misreading of the ADEA, will create major disruption of bridge-to-Medicare retiree programs throughout the United States. A legislative remedy may not be forthcoming (and, in any event, may not be retroactively effective). Retroactive and prospective benefit disbursements to hundreds of thousands, probably millions, of individuals may be needed, for multi-year coverage periods (essentially, from age 65 Medicare entitlement until death), unless this decision is corrected. The Third Circuit has decided an important question of federal law that has not been, but should be,

settled by this Court. The petition for a writ of certiorari should be granted.

December 29, 2000.

Respectfully submitted,

WILLIAM J. NELLIS
Counsel of Record
Secretary to the Board
Central States, Southeast
and Southwest Areas
Health & Welfare Fund
9377 West Higgins Road
Rosemont, Illinois 60018
(847) 518-9800

THOMAS C. NYHAN
General Counsel
Central States, Southeast
and Southwest Areas
Health & Welfare Fund
9377 West Higgins Road
Rosemont, Illinois 60018
(847) 518-9800

Attorneys for Amicus Curiae